



Supreme Court's decision to remand Gloucester leaves transgender guidance unclear

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On February 22, 2017, the Trump administration announced a withdrawal from a key Title IX policy position taken under the Obama administration. Contrary to the previous administration, the Trump administration declared that it would no longer construe a critical Title IX regulation to require institutions to allow access to sex-segregated facilities based on gender identity. This decision has complicated an already murky area of the law, particularly in light of a number of Title IX cases working their way through the courts. The cases could be read to conflict with the administration's change of heart, which begs the question of what Title IX requires when it comes to crafting and implementing policies regarding transgender students. Although there are currently no clear answers to this question, understanding two cases provides helpful context.

G. G. v. Gloucester County School Board

G. G. v. Gloucester County School Board centers on a transgender high school student in Virginia who was told at the building level that he could use the restroom based upon his gender identity. The school board subsequently found out and passed a resolution requiring bathroom use based upon biological sex. A lawsuit

ensued. Eventually, in April 2016, the Fourth Circuit Court of Appeals weighed in on the matter and issued a relatively narrow decision. According to its view, the Obama administration's previous interpretation of the relevant Title IX regulation — to require schools to allow students to use the bathroom based upon gender identity — was reasonable. The Fourth Circuit therefore deferred to that view.

The effect of that ruling has become murkier since April. In October, the Supreme Court agreed to hear the case and stayed the Fourth Circuit's ruling in the meantime. Following the administration's change in stance, the Supreme Court in late February asked the parties to weigh in on whether the Court should still review the case. Both parties agreed that the Court should still hear the case in order to decide, fully and finally, whether Title IX prohibits discrimination against transgender students. Despite this agreement, on March 6, 2017, the Court vacated the Fourth Circuit's decision and remanded the case for another look at the issues in light of the administration's change in stance. The Court's decision to punt on the issues for now leaves the state of the law in this area unclear.

Highland Local School District v U.S. Department of Education

The lack of clarity in Gloucester gives way to lower court cases like Highland Local School District v. U.S. Department of Education to define the contours of Title IX's application to transgender students. Highland took place in the Southern District of Ohio, which covers Columbus and the remainder of the southern half of Ohio. The facts in Highland were similar to those in Gloucester: an 11-year-old transgender student and her parents asked a school district to permit her to use the girls' restroom, and the district denied the request. The trial court's opinion was similar to the Fourth Circuit's decision in Gloucester in that it held that the Obama administration's prior interpretation of Title IX was reasonable. The court also went a bit further. Although he did not explicitly decide the issue, the judge (Judge Algenon L. Marbley), walked right up to the line of holding that, no matter what the administration's interpretation of the law might be, Title IX prohibits discrimination against transgender students as a matter of law. He also held that this kind of discrimination violates the Fourteenth Amendment's Equal Protection Clause, which applies to public institutions separate and aside from Title IX.

There are a few more noteworthy items within Judge Marbley's opinion. For one thing, it came at the preliminary injunction stage, which means it was likely not a final ruling. That said, his language was strong enough that it could have persuasive effect on other courts facing similar issues and left little doubt of how the case would turn out were it to proceed forward until the end. Also noteworthy is the fact that the Sixth Circuit declined to stay Judge Marbley's ruling pending the outcome of Gloucester in the Supreme Court. Although the Sixth Circuit's decision was not an ultimate resolution of the case, it was significant. The major factor in whether to stay a ruling like this is whether the appealing party, in this case, the school district, has a high likelihood of winning on the merits by the end of the case. The Sixth Circuit

declined to stay the case, and essentially adopted Judge Marbley's view of the law. Since that time, the Sixth Circuit has held the appellate proceedings in Highland in abeyance, effectively pushing pause until the Supreme Court's resolution of Gloucester. With the Supreme Court's decision to vacate Gloucester, the Highland appeal on the merits of Judge Marbley's decision will proceed, with an argument likely this spring.

Where does that leave things now?

The answer to this question is "without much clarity." For the time being, it's probably most helpful to think about what is clear and what isn't clear. Based on Judge Marbley's opinion in Highland, it's likely reasonable to conclude that, at least as it applies to schools in the Southern District of Ohio, Title IX has been interpreted to prohibit discrimination against transgender students and that any contrary assertions in court are going to face significant scrutiny from Judge Marbley to the extent the Highland case proceeds any further. For public schools, it's even clearer, based on Judge Marbley's ruling, that such discrimination violates the Constitution's Equal Protection Clause. Beyond that, there's a lot up in the air. Any conclusions about Highland are indeed only good for the time being. With the Supreme Court's decision to punt on the issues in Gloucester, it's possible that the Sixth Circuit could issue an opinion reversing Judge Marbley's decision in Highland. Until further notice, however, the decision in Highland is good law.

In addition to case law, it is helpful to remember that guidance from numerous sources still addresses transgender students and transgender employees and has not been withdrawn. For example, multiple Dear Colleague Letters from the Office for Civil Rights still make clear that discrimination and harassment based on gender identity is prohibited. Both the Equal Employment Opportunity Commission (EEOC) and Occupational Safety and Health Administration (OSHA) have guidance in effect that requires employees to be permitted to use restrooms corresponding with their gender identity. Athletic organizations, such as the NCAA and the Ohio High School Athletic Association (OHSAA), also have guidance regarding transgender athletes. And, of course, state and local laws may speak to the issue as well.

Revised guidance, additional guidance withdrawals and case law will hopefully help provide clarity. In the meantime, we recommend that school districts consider whether it may be appropriate to communicate with their students, reminding them of behavioral expectations with regard to behavior towards each other. Hopefully, this will help as we wait for more definite answers on what is required.